No. 4024

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN ENGLISH, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	}

BRIEF FOR PLAINTIFF IN ERROR.

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FILED

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Statement of the Case.

This case arises on a writ of error from the District Court of the United States for the southern district of California, northern division, upon a verdict and judgment thereon under which the plaintiff in error, John English, was convicted and sentenced for conspiring with one Spratt, one Burke, and others unknown to the grand jury, to violate the national prohibition act (1) by selling at Fresno, Fresno County, California, whisky fit for beverage purposes and containing alcohol in excess of one-half of one per cent by volume; (2) by transferring for beverage purposes whisky and alcohol in an automobile on the public streets of the City of Fresno, County of Fresno, California; and (3) by possessing whisky and alcohol fit for

beverage purposes at Fresno, County of Fresno, California. (Transcript pages 6 and 7.)

The indictment charges six overt acts alleged to have been in furtherance of the said conspiracy and to accomplish the purpose thereof, as follows:

> (1) "* * * at the city of Fresno, county of Fresno, state of California, on or about the 15th day of December, 1921, said defendants did sell, to such persons who might thereafter desire to procure same, intoxicating liquor fit for beverage purposes then and there containing in excess of one-half of one per cent by volume;"
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> (2) "* * * at the city of Fresno, county of Fresno, state of California, on or about the 15th day of December, 1921, the said defendant, John English, *alias* John Kelly, delivered to the office of said defendant, C. A. Burke, in the city of Fresno, a case of intoxicating liquor fit for beverage purposes, then and there containing alcohol in excess of one-half of one per cent by volume;"
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> (3) "* * * at the city of Fresno, county of Fresno, state of California, on or about the 15th day of December, 1921, said defendant, John English, *alias* John Kelly, transported one case of intoxicating liquor fit for beverage purposes and containing alcohol in excess of one-half of one per cent by volume, over the public streets of the city of Fresno, from the office of said defendant, C. A. Burke, to the home of said defendant George A. Spratt;"
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> (4) "* * * at the city of Fresno, county of Fresno, state of California, on or about the 10th day of January, 1922, said defendant, George A. Spratt, sent a telegram addressed to defendant John English at No. 745 Market

Street, San Francisco, California, which read, 'Can use 10 shares of stock Friday. Spratt.' "

(5) "* * * at the city of Fresno, county of Fresno, state of California, on or about the 13th day of January, 1922, the said defendant John English, *alias* John Kelly, drove an automobile, containing intoxicating liquor fit for beverage purposes and containing alcohol in excess of one-half of one per cent by volume, over the streets of the city of Fresno to the home of defendant, George A. Spratt."

(6) "* * * at the city of Fresno, county of Fresno, state of California, on or about the 13th day of January, 1922, the said defendant, C. A. Burke, went to the home of said defendant, George A. Spratt."

(Tr. pp. 8 to 10, inclusive.)

Errors Relied Upon.

Plaintiff in error relies upon the following specifications which are hereinafter numbered according to the numbers given to them in the assignment of errors:

II.

The Court erred in overruling defendants' objection to the introduction of evidence of a conversation between witness D. D. Simpson and George A. Spratt, one of the above-named defendants, and erred in admitting said conversation in evidence, said objection being on the ground that said conversation was immaterial, irrelevant and incompetent, the proper foundation has not been laid, there has been no evidence offered to prove or tending to prove the charge alleged in the indictment, to wit, the charge of conspiracy, that as to the defendants

Burke and English it is hearsay, and that it did not take place during the course of any conspiracy alleged in the indictment.

That the witness testified over the objection of defendant as follows:

That the conversation took place about the 9th or 10th of January, that she and Agent Parker told Spratt that they wanted to buy some bonded whisky, that Spratt told them he could sell it in ten case lots for $125.00 a case; also, alcohol at $10.00 a gallon; that he knew a man in San Francisco with 300 cases of bonded whisky; that witness and Parker ordered 10 cases of whisky and 10 gallons of alcohol from Spratt; to be delivered January 13, 1922. That Spratt did not mention the name of the party in San Francisco, and the conversation was on January 9th.

That the defendant duly excepted to the ruling of the Court.

(Tr. p. 32.)

III.

That the Court erred in overruling the defendants' objection to the admission as evidence of a conversation had between witness D. D. Simpson and George A. Spratt, had on January 13th, and in admitting said conversation as evidence, said objection being on the same grounds as set forth in paragraph II hereof, to which ruling defendant duly excepted. Said testimony so admitted over the objection of defendant is as follows:

He (meaning George A. Spratt) told me that a load of liquor was on the highway. He asked Mr. Parker if he had the money to pay for it. We were to pay for it when delivered. I told him Mr. Parker had the money. He said, "Well, can I depend on you to be here at 7:30 o'clock." I said we would both be there.

Spratt said he would go out on the highway and tell the man to come in.

(Tr. p. 33.)

IV.

The Court erred in admitting over the objection of defendant evidence of the witness D. D. Simpson of a conversation had with the defendant George A. Spratt on January 13, 1922, to which ruling defendant duly excepted, and which conversation was as follows,

He (meaning Spratt) told me that the man was waiting out on the highway with this load of liquor and he wanted to know if Mr. Parker had the money to pay for it and if he could depend on Mr. Parker and myself being present at 631 "O" Street, that it would be delivered at 7:30 P. M. Burke came in a few minutes later and I spoke to him about a taxi bill I owed and got some money from Mr. Parker to pay him.

Said objection was on the same grounds as set forth in paragraph II hereof.

(Tr. pp. 33 and 34.)

VII.

The Court erred in admitting as evidence over the objection of defendant, to which ruling defendant duly excepted, the evidence of George V. Parker as to a conversation between himself and defendant George A. Spratt, had on January 5th or 6th. The witness had testified that he first saw defendant English on January 13th, and that he had had a conversation with Spratt the first night they met, January 5th or 6th.

Q. What was the conversation that you had with Mr. Spratt there?

Mr. Lindsay. I object to that as immaterial, irrelevant and incompetent, not within the issues, the proper foundation has not been laid,

and there has been no evidence offered here proving or tending to prove conspiracy as alleged in the indictment, and this objection is made on behalf of all the defendants, and on behalf of the defendants Burke and English I also object on the ground that as to them and each of them, particularly, as hearsay.

The Court. I will reserve my ruling.

The Witness. Spratt said he could supply liquor in any amount, any kind of liquor.

(Tr. pp. 35 and 36.)

VIII.

The Court erred in admitting over the objection of defendant, evidence of the witness Parker as to another conversation as follows:

Q. Did you have a conversation with Spratt the next day at 4 o'clock? A. We did.

Q. I will ask you to state the conversation you had.

Mr. Lindsay. Same objection as before, if your Honor please.

The Court. Ruling reserved as to English and Burke. Overruled as to Spratt.

Mr. Lindsay. Exception.

The witness then testified that Agent Simpson had asked Spratt if he could supply liquor and that Spratt answered yes, and asked how much they wanted and that they told him ten cases, and that Spratt said it was bonded liquor. That they also ordered ten gallons of alcohol. That the conversation was on the 9th. That the conversations were both prior and subsequent to the 13th of January; that English was first mentioned subsequent to the 13th of January when Spratt made a statement as to his dealings with Burke and English on matters that transpired in December, 1921. This was after the raid had been made.

(Tr. p. 36.)

liquor from him; that English told him that he could supply the liquor at $115.00 a case.

During the testimony it was admitted by the United States Attorney and so held by the Court that this conversation would not bind the defendants Burke and English, but only bind Spratt.

(Tr. pp. 36, 37 and 38.)

X.

The witness was then called on to identify a telegram as being in the handwriting of Spratt and testified that he had seen Spratt sign his name about 20 times.

The testimony was objected to as immaterial and irrelevant and on the ground that the witness had not qualified to answer the question.

The objection was overruled and the witness testified that the signature was George Spratt's.

(Tr. p. 38.)

XI.

Sheldon Hunter was then sworn and testified that he was the Fresno manager of the Western Union. He was shown the telegram. He testified that he had never seen it until he got it out of the office files of the Western Union. He was asked if the telegram had been sent.

Mr. Lindsay. I object to that as immaterial, irrelevant and incompetent, hearsay, and on the further ground that there has been no evidence here of any conspiracy, therefore evidence as to any overt act alleged in the indictment is irrelevant.

The Court overruled the objection and the defendants except.

The witness then testified over said objection that the telegram had transmission marks on it that the operator had sent it.

(Tr. pp. 38 and 39.)

IX.

The witness was then asked to give the conversation made in the presence of the Federal officials and referred to as a statement. Defendants objected thereto and the Court sustained the objection as to English and Burke and overruled it as to Spratt. The following proceedings were then had.

Mr. Lindsay. If your Honor please, may I make one more objection that has occurred to me? I understand that the testimony has been declared by your Honor to be irrelevant as to the defendants Burke and English, and my objection has been sustained as to those defendants.

The Court. Yes.

Mr. Lindsay. That is the ruling. Then I state that it is irrelevant for all purposes; unless it relates to more than one of the defendants it must be irrelevant. Unless more than one of the alleged conspirators is to be bound by the testimony it must be irrelevant to the single conspirator.

The Court. Objection overruled.

Mr. Lindsay. Exception.

The witness then testified over said objection that Spratt said he had secured the liquor he sold during the month of December from John English, that Burke had introduced them, that Burke had advanced Spratt the money to purchase the liquor, that it had been delivered at Spratt's house and was the liquor sold to the Federal agents during the month of December. That Spratt was asked where he had secured this load of liquor and he said he sent a telegram *of* John English in San Francisco reading, "Can use ten shares of stock Friday night," and that English brought the liquor down there. That Spratt continued and told how he had first met English and secured

XII.

The Government then offered a bottle of liquid, identified by the witness Simpson as one she purchased on the 20th of December at 631 "O" Street, at Spratt's house.

It was objected to by defendants as immaterial, irrelevant and incompetent, not one of the overt acts alleged in the indictment, and not any act in pursuance of the alleged conspiracy.

The objection was overruled and the defendants excepted.

(Tr. p. 39.)

XIII.

The Court erred in admitting as evidence the testimony of the Witness Simpson (recalled) as a conversation relating to the purchase of liquor from defendant Spratt and one Lulu Johnston on the 20th day of December, 1921. The proceedings were as follows:

Q. What was said about the purchase of this liquor by you to either of these defendants, or what was said by any of the defendants concerning it, at the time?

The defendants objected to the same as immaterial, irrelevant and incompetent, hearsay, and not within the issues, and no foundation laid.

The Court. Objection overruled except as to the defendant English; as to him I will take it under advisement.

Mr. Lindsay. Exception.

The witness then testified over said objection, —We said to Lulu Johnston and George Spratt in the presence of Burke that we wanted to buy a bottle of whisky and Lulu Johnston and George Spratt said it was genuine whisky and they invited us to have a drink out of another bottle labelled the same. This was about 9

o'clock P. M. I bought the whisky from Johnston and Spratt and the money was given to Johnston by Agent Emerick.

Mr. Lindsay. I do not understand, if your Honor please, that this Johnston person is accused of being one of these conspirators. We are certainly not bound by anything that was done by this lady in either procuring whisky with the Johnston person or buying whisky.

Mr. Ellis. She said, your Honor, and I think without question, that she bought it from Spratt and this Johnston woman. They were there at the house together.

The Court. Wait a minute. This indictment charges a conspiracy between these three defendants and various other persons to the Grand Jurors unknown. Johnston may have been one of those in the conspiracy. I will overrule the objection.

Mr. Lindsay. Exception.

Mr. Ellis. I only wanted it for counsel. She said she bought it from Spratt. That is all I wanted to develop. That will be satisfactory.

Mr. Lindsay. None of it is satisfactory. We have objected to all of it as far as that is concerned.

(Tr. pp. 39 and 40.)

XIV.

The Court erred in admitting the testimony of Byron White concerning a telegram as follows:

Witness testified that he was with the Western Union Telegraph Company in Fresno. He was shown the telegram marked United States Exhibit No. 1 for identification, and continued.

I believe I accepted it across the counter; I do not know the defendant Spratt, I do not know him as the person from whom I received the telegram.

The telegram was then offered in evidence.

Mr. LINDSAY. I object to it as irrelevant, immaterial and incompetent, has not been identified nor in any manner connected with any defendant in this case, not a part of the case, not within the issues.

The COURT. A witness testified that was the defendant Spratt's signature, as I remember it.

Mr. ELLIS. It is.

Mr. LINDSAY. That is the extent of it. No proof that it was ever sent or received.

The COURT. That is for argument to the jury. I will overrule the objection.

To which ruling the defendants duly excepted. The telegram was then, over said objection, admitted in evidence.

(Tr. p. 41.)

XV.

The Court erred in admitting the testimony of the witness Johnston as to a conversation between agents Simpson and Parker and the defendant Spratt during the week preceding the raid on January 13th, concerning liquor, defendants objected to said testimony on the ground that it was immaterial, irrelevant and incompetent, not within the issues, and hearsay as to the defendants English and Burke.

The COURT. As to Burke and English, it will be taken under advisement, overruled as to Spratt.

Mr. LINDSAY. Exception.

Over said objection witness testified that they were still trying to get liquor, but did not remember whether they said anything about how it was to be procured. Spratt said he thought he could get it. She saw English there the night of the 13th when he was brought in by the officers. Did not hear any conversation about a telegram. Simpson told me to ask

Spratt if he had ordered the liquor. He said that he had.

(Tr. pp. 41 and 42.)

XVII.

The Court erred in denying the motion of plaintiff in error John English for a new trial in that the verdict is not supported by the evidence and is against the evidence, and in that the Court committed errors at law at the trial in the admission of evidence over the objection of the defendant English.

XVIII.

The Court erred in denying the motion of plaintiff in error in arrest of judgment, in that there is no evidence of any overt act showing the plaintiff in error John English to have been guilty of a conspiracy, and in that there were errors at law committed at the trial.

(Tr. p. 43.)

Argument.

We wish at the outset to call the attention of the court to the record as to the testimony and evidence objected to and covered by specifications II, III, IV, VII, VIII, XIII and XV. As to all of this testimony upon objection by the defendants it was admitted as to the defendant Spratt, and the court's ruling was expressly reserved as to defendants Burke and English. (See Tr. p. 46, lines 7 and 8 from the bottom; p. 47, lines 17 and 18; p. 48, lines 12 and 13; p. 49, lines 6 and 7; p. 51, line 4 and lines 17 and 18; p. 60, lines 2, 3, and 4; p. 63, lines 17 and 18.) The court at no time admitted or rejected it, and it was, therefore, merely offered

but not received in evidence, and could not properly be considered by the jury.

Counsel attempted to secure a ruling on all of these reserved matters, as appears at the bottom of page 68 and the top of page 69 of the transcript, and the court responded by dismissing the case against the defendant Burke, but made no ruling as to the admission or rejection of the evidence as to the defendant English.

For the purposes of our argument as to admissibility we have treated it as having been admitted. Taking the points up in order:

In II the witness Simpson details a conversation with Spratt about the purchase of whisky, and English is not connected in any way and his name was not even mentioned in the conversation. (Tr. pp. 45, 46 and 47.)

The same is true of III and IV.

(Tr. pp. 47, 48 and 49.)

In VII and VIII the witness Parker related a conversation with Spratt on January 5th or 6th, and stated that he first saw the defendant English on January 13th (Tr. pp. 50 and 51), and another conversation on the 9th.

In XIII and XV the witness Simpson testified as to a purchase of liquor from Lulu Johnston and defendant Spratt, on the 20th of December, 1921, and Lulu Johnston related dealings and conversations with Simpson, Spratt and Parker about liquor.

In none of these cases did English figure at all, and neither at the time this evidence was offered, or at any other time during the trial, was there any evidence to support the charge of conspiracy.

> "Proof of the existence of the conspiracy ordinarily should precede any proof of acts or declarations of the co-conspirators." 16 *Corpus Juris*, Sec. 1288

See also *Hanger v. U. S.*, 173 Fed. 54.

We appreciate that this rule is not absolute or unyielding (*Doyle v. U. S.*, 169 Fed. 625), but in the present case there was no subsequent evidence admitted as to the defendant English, showing a conspiracy.

The evidence regarding the telegram sent by Spratt, to which objection was made as appears by specifications X, XI and XIV (see Tr. pp. 56, 57 and 69), is not binding on defendant English. There is no proof that it was ever delivered to English, and the record (Tr. p. 69) shows that it was delivered to a man named H. Hahn.

There is a presumption that a telegram, or a letter, delivered to the company or the post office in the regular course, for transmission, properly addressed to his true place of residence, or where he is shown to have been, was delivered to the addressee, which presumption is strengthened, if not denied.

> *Jones on Evidence*, Second edition, Section 352, page 47; and Section 353, page 49;
> 22 *Corpus Juris*, p. 102.

But in the present case there was no showing that 745 Market Street, San Francisco, was the address of English or that he had ever been there. Furthermore, the record affirmatively shows that the telegram was delivered to H. Hahn and no connection is shown between him and English. For these reasons English was not obliged to deny the delivery, for the presumption failed. The presumption attaches on account of the public character of the telegraph company, and does not arise where a message is delivered to an outsider to deliver for transmission, or to deliver after transmission.

37 *Cyc.* p. 1680, Sec. 5, and p. 1682.

The statement of Spratt, at page 65 of the transcript, was properly evidence against Spratt only, it having been made after the arrest of the defendants. It is not evidence against English at all, although it must have been considered against him by the jury—otherwise they could not have believed there was a conspiracy.

If there is struck from the record the evidence that was admitted as to Spratt and rejected as to English, and the law is applied to the testimony concerning the telegram, there remains nothing in the record concerning English, except that he was arrested on January 13th, 1922 in Fresno, with whisky in his possession. (Tr. pp. 49, 56, 64, 67 and 68.)

This absolute lack of evidence can only be appreciated by reading the transcript, from pages

44 to 69, inclusive, and drawing a pencil through pages 52, 53, 54, 55, 65, and all but six lines of 66, all of which evidence so eliminated was rejected as to English.

One should then draw a line through the last half of page 56, all of page 57, the first half of pages 58 and 61, the top of page 62 and all of page 69, all of which refers to the telegram, which we have shown does not bind English.

Of what remains in the bill of exceptions, one should then mark out pages 45, 46, 47, 48, the first six lines of 49, the first sixteen lines of page 51, the last seven lines of page 59, the first four lines of page 60, and all of page 63, with regard to all of which evidence the court made a ruling admitting it as to Spratt, and expressly reserved its ruling as to English. As to English, therefore, this evidence was merely offered, and was neither rejected nor admitted.

If it was not in evidence, we must assume that the jury did not consider it in reaching a verdict. Let us consider now what remains of the evidence to support the verdict. It is only the testimony on pages 49, 50, the first half of 56, 64, the bottom of 66, 67 and 68, which is almost entirely confined to possession of liquor by English in Fresno on January 13, 1922, for which offense the records of the district court at Fresno show he pleaded guilty and paid the penalty shortly after that date.

We have read carefully the case of *Oakland Water Front Co. et al v. Le Roy, et al*, 282 Fed. 285, recently decided by this court, and are mindful of what is said therein about reserved rulings as to evidence.

The present case is we think distinguished from that case. Here, counsel in many cases, excepted to such ruling, and as appears at the bottom of page 68 of the transcript, moved to strike, to which the court's only response was:

> "Well, the case against Burke will be dismissed." (Tr. top of p. 69.)

In the Le Roy case the defendants offered the evidence upon which ruling was reserved, the plaintiffs allowed it to go in subject to objection, and the attention of the court was not again called to it. The defendants then attempted to predicate error on the court's failure to rule.

It may be argued that the defendant English should have taken the stand and denied receipt of the telegram, and should have denied a concert of action by previous agreement with the others charged.

But, as we have shown, there was no presumption of its receipt, and the admissions of Spratt, after the arrest, were denied admission into evidence as to English. There was nothing in the record to require that he take the stand, and he stood on his right to be presumed innocent until proven guilty of the conspiracy charged.

We believe the jury was misled by the telegram and the statement of Spratt which was read into the record, and that the court erred in its rulings on evidence above enumerated, and in denying defendant's motion for a new trial.

We, therefore, ask for a new trial at which the plaintiff in error can prove his innocence of conspiracy and that his presence in Fresno on January 13, 1922 was by mere chance, and not in response to the telegram, which he did not receive.

Dated, San Francisco,
October 1, 1923.

Respectfully submitted,

M. A. Thomas,
Chas. C. Sullivan,
Attorneys for Plaintiff in Error.